162 U.S. 490

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 147.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JANE SKOTTOWE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED AUGUST 22, 1892.

(15,108.)

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INDEX.

	Original.	Print.
Stipulation as to record (omitted in printing)	*a*	—
Caption (" ")	*b*	—
Statement (" ")	1	—
Transcript from circuit court of Wasco county	3	1
Complaint	3	1
Summons (omitted in printing)	7	—
Sheriff's return (" ")	8	—
Motion to make complaint more definite (" ")	10	—
Petition for removal to United States court	12	3
Order denying removal to United States court	17	5
Bond for removal to United States court	19	6
Affidavit and application to take testimony (omitted in printing)	22	—
Notice of application for commission to take deposition (omitted in printing)	25	—
Notice of application to take deposition out of State (omitted in printing)	27	—
Affidavit and application to take testimony of plaintiff (omitted in printing)	30	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1895.

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Stipulation as to record (omitted in printing)	*a*	—
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Statement (" ")	1	—
Transcript from circuit court of Wasco county	3	1
Complaint	3	1
Summons (omitted in printing)	7	—
Sheriff's return (" ")	8	—
Motion to make complaint more definite (" ")	10	—
Petition for removal to United States court	12	3
Order denying removal to United States court	17	5
Bond for removal to United States court	19	6
Affidavit and application to take testimony (omitted in printing)	22	—
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Notice of application to take deposition out of State (omitted in printing)	27	—
Affidavit and application to take testimony of plaintiff (omitted in printing)	30	—

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	Original.	Print.
Order denying change of venue.....(omitted in printing)..	32	—
Demurrer.....	33	7
Defendant's answer.....	35	8
Reply.....	44	12
Order allowing defendant further time to answer complaint (omitted in printing).....	49	—
Motion for nonsuit.....(omitted in printing)..	50	—
Verdict.....(" ")..	52	—
Order overruling judgment for nonsuit..(" ")..	53	—
Motion for new trial.....(" ")..	54	—
Order denying new trial.....(" ")..	57	—
Judgment on verdict.....	58	15
Notice to produce lease, &c.....(omitted in printing)..	59	—
Notice of appeal and assignment of errors.....	61	15
Undertaking on appeal.....(omitted in printing)..	78	—
Judgment.....	82	24
Opinion.....	84	25
Petition for writ of error.....	105	36
Bond on writ of error.....	115	41
Clerk's certificate.....	118	42
Writ of error.....	119	42
Citation.....	120½	43
Proof of service of citation.....	121	44
Stipulation to print parts of record.....	123	44

* * * * * * *

a–3 *Complaint.*

In the Circuit Court of the State of Oregon for Wasco County.

JANE SKOTTOWE, Plaintiff,
vs.
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Defendant.

Now comes the plaintiff in the above-entitled cause and, for a cause of action against the defendant, alleges:

I.

That the defendant is a corporation duly organized, existing, and doing business in the State of Oregon and as such corporation is and was at all the times and dates hereinafter mentioned and long prior thereto in the operation of a line of railroad running from Portland, Oregon, to The Dalles and Pendleton, Oregon, and other places farther east, generally known as the Oregon Railway and Navigation Company's line of road, and in connection therewith and incident thereto has been for such time and now is in the possession of and operating a line of boats running from The Dalles, Oregon, to Portland, Oregon, together with all the bridges, wharf-boats, ways, etc., used in getting to and from the landings of the aforesaid line of boats, and had been and was and still is carrying passengers thereon as a common carrier for hire.

II.

That the landing of the defendant where its said line of boats has been accustomed to land and take passengers at The Dalles, Oregon, is on the Columbia river, about a quarter of a mile below the business and residence portion of said city, and that the only means of getting from said portion of said city to said wharf-boat and landing is by passing over a certain elevated bridge owned, controlled, and operated by the defendant and used by it as
4 a means of passing to and from its said wharf-boat and landing as aforesaid.

III.

That on the 17th day of October, 1890, and long prior thereto the defendant had permitted the railing upon the north side of said elevated bridge, at a point where the same was elevated about twenty feet above the ground, to get out of repair and be torn down and negligently and carelessly suffered said bridge to be and remain without any railing at said point, whereby it was made dangerous and unsafe for persons travelling over the same going to and from the aforesaid wharf-boat and landing of the defendant's line of boats.

IV.

That at said times and for a great length of time prior thereto the defendant had been and was in the habit of carrying passengers upon its said line of boats from The Dalles, Oregon, to Portland, Oregon, for hire and was a common carrier thereof and had been and was in the habit of permitting passengers travelling upon said boats to go upon the same at night and sleep thereon so as to be there in the time of starting in the morning.

V.

That on the said 17th day of October this plaintiff started to go across said bridge to said wharf-boat and landing of the defendant, where the defendant's boat then was, for the purpose of taking passage thereon for the aforesaid city of Portland.

VI.

That at said time the defendant had failed to provide lights upon the said bridge, and while the plaintiff was passing over the same as aforesaid, after dark, on the evening of the said day, by reason of the defendant's negligently permitting the said railing upon the said bridge to be down and remain down and remain torn down and away, and by reason of the negligence of the defendant in failing to provide lights thereon, and by reason of the dangerous construction of said bridge, this plaintiff walked and fell from the same to the ground below without fault upon her part, whereby she was greatly bruised, injured, and crushed, and whereby she suffered great bodily and mental pain, and whereby she has been permanently injured and incapacitated from getting about and carrying on her usual avocations of and enjoying life, and whereby she will continue to suffer great physical and mental pain and discomfort through the remaining years of her life, and whereby she has been compelled to and did expend and incur large sums of money for medicine, medical skill and attendance, care and nursing—all to her damage in the full sum of $50,000.

Wherefore the plaintiff prays judgment against the defendant for said sum of $50,000 and for her costs and disbursements made and expended in this action.

A. S. BENNETT,
Attorney for Plaintiff.

STATE OF OREGON, }
County of Wasco, } ss:

I, Jane Skottowe, being first duly sworn, upon my oath say that I am the plaintiff in the above-entitled cause, and that the above and foregoing complaint is true, as I verily believe.

(Signed) JANE SKOTTOWE.

Subscribed and sworn to before me this 30 day of October, 1890.

J. T. MULLON,
Notary Public for Oregon.

[SEAL.]

6–11 Wasco county circuit court, Oregon. Jane Skottowe *v.* O. S. L. & U. N. R'y Co. Complaint. Filed Oct. 31, 1890, at 10.15 a. m. J. B. Crossen, clerk. A. S. Bennett, att'y for plaintiff.

* * * * * * *

12 *Petition on Removal to U. S. Court.*

In the Circuit Court of the County of Wasco, State of Oregon.

JANE SKOTTOWE, Plaintiff,
vs.
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Defendant.

To the honorable the circuit court of Oregon in and for the county of Wasco:

Your petitioner, The Oregon Short Line & Utah Northern Railway Company, respectfully shows that it is the defendant served in the above-entitled action; that this action is of a civil nature, and that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum and value of $2,000.00; that your petitioner is a corporation organized and existing and possessing certain corporate powers embraced in, depending upon, and provided for in two certain acts of Congress, hereinafter particularly set forth and mentioned, creating and organizing the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and creating and organizing the Utah Northern Railway Company, a corporation in the Territories of Utah, Idaho, and Montana; that your petitioner was so incorporated, organized, and created in the manner following, to wit:

Long prior to the commencement of this action in the circuit court of the State of Oregon, county of Wasco, the Oregon Short Line Railway Company, a corporation mentioned in and organized and created by an act of the Congress of the United States approved August 2, 1882, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," the Utah and Northern
13 Railway Company, a corporation mentioned in, organized, and created by an act of the Congress of the United States approved June 20, 1878, making and creating said company a railway corporation in the Territories of Utah, Idaho, and Montana, and certain other railway corporations organized and created under the laws of the Territory of Utah, to wit, the Utah Central Railway Company, the Salt Lake & Western Railway Company, the Utah & Nevada Railway Company, and the Ogden & Syracuse Railway Company, and a railway corporation organized under the laws of the Territory of Wyoming, incorporated under the corporate name of the Idaho Central Railway Company, and a railway corporation organized under the laws of the State of Nevada, incorporated under the corporate name of the Nevada Pacific Railway Company, made and entered into certain articles of consolidation, whereby and

under and pursuant to which a certain consolidated railway corporation was formed and created under and by the corporate name of the Oregon Short Line and Utah Northern Railway Company, which said consolidated corporation is your petitioner; that the consolidation aforesaid creating and organizing your petitioner was perfected under and pursuant to the laws of the Territory of Utah and Wyoming, of the State of Nevada, and of the laws of the United States in force on the first day of August, 1889; that your petitioner possesses all the corporate functions, powers, and authority possessed by the several constituent companies so entering into such consolidation, and your petitioner derives and depends for its existence and its authority upon certain of the acts and laws passed by the Congress of the United States, and particularly the two acts
14 of Congress hereinbefore referred to, organizing two of the constituent companies forming and entering into such consolidation, to wit, the Oregon Short Line Railway Company and the Utah Northern Railway Company.

That ever since such consolidation your petitioner has existed as a corporation under the corporate name aforesaid, exercised and assumed the corporate powers and functions as such corporation, and had and claims a corporate existence under and pursuant to and by virtue of the acts of the Congress of the United States, and particularly the acts hereinbefore mentioned.

Your petitioner further shows that this action arises under the Constitution and laws of the United States, and more particularly under the two acts of the Congress of the United States hereinbefore mentioned and specifically referred to, upon which the existence of your petitioner and its corporate functions and powers depend, and your petitioner has a defense to this action arising under the same.

Your petitioner further shows that the time to plead or answer in the above-entitled cause by your petitioner has not yet expired.

Your petitioner herewith offers a bond, with good and sufficient sureties, for its entering in the circuit court of the United States for the district of Oregon on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court of the United States if said court shall hold that this — was wrongfully or improperly removed thereto.

And your petitioner prays this court to proceed no further herein except to make the order of removal and to accept said sureties and bond and to cause the record herein to be removed into
15 said circuit court of the United States in and for the district of Oregon.

And you- petitioner will ever pray, etc.

THE OREGON SHORT LINE &
UTAH NORTHERN R'Y CO.,
By W. W. COTTON AND
ZERA SNOW, *Its Attorneys.*

STATE OF OREGON, }
County of Multnomah, } ss:

I, Zera Snow, being duly sworn, do say that I am one of the attorneys of the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

ZERA SNOW.

Subscribed and sworn to before me this 8th day of November, 1890.

[SEAL.] F. S. LAFFERTY,
Notary Public for Oregon.

16 In the circuit court, State of Oregon. Jane Skottowe *vs.* O. S. L. & U. N. R'y Co. Petition on removal to U. S. court. Filed Nov. 10, 1890. J. B. Crossen, clerk, by G. P. Morgan, deputy.

17 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held in the court-house, in Dalles city, on the 10 day of November, 1890, at which were present the following officers:

Hon. E. D. Shattuck, judge; D. L. Cates, sheriff; J. B. Crossen, clerk.

And the following proceedings *was* had on Friday, the 14 day of November, A. D. 1890, the same being the 5th judicial day of said term, to wit:

Order Denying Removal to U. S. Court.

JANE SKOTTOWE, Plaintiff,
vs.
OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Defendant.

It appearing to the court that heretofore and before the expiration of the time for appearance and answer or other plea of the defendant to the complaint herein the defendant filed its petition for removal of this cause to the circuit court of the United States for the district of Oregon upon the ground in the petition stated, and likewise filed its bond on removal conditioned as by law provided, which bond is by the court now approved, and defendant now insisting upon its petition and an order directing this cause to be certified to said United States circuit court, now, on this day, in consideration of the same, it is ordered that said petition be, and the same is hereby, denied; to which ruling of the court the defendant, by its counsel, in open court, excepts, the defendant, by
18 its said counsel, protesting and objecting to any further proceedings herein in this court upon the ground that said cause

is removable and has been removed to the said circuit court of the United States; which objection and protest are by the court now overruled, and it is ordered that the cause be retained in this court for further proceedings herein, the defendant, by its counsel, protesting and objecting to further proceedings herein; and to the end that the defendant may be fully protected in whatever right it may have by virtue of its said petition and bond on removal, it is considered by the court that said further proceedings herein in this court as may be had in the cause are had over the objections and protest of the defendant, the defendant appearing herein only because of the order of the court retaining this cause for further proceedings herein.

(Signed) E. D. SHATTUCK, *Judge.*

Attest: J. B. CROSSEN, *Clerk.*
By G. P. MORGAN, *Deputy.*

19 *Bond on Removal to U. S. Court.*

In the Circuit Court of Wasco County, State of Oregon.

JANE SKOTTOWE, Plaintiff,
vs.
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY CO., Defendant.

Know all men by these presents that The Oregon Short Line & Utah Northern Railway Company, as principal, and Edward Cookingham and B. Campbell, as sureties, are held and firmly bound unto Jane Skottowe and to all other persons whom it may concern in the penal sum of five hundred dollars ($500.00); to the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the said Oregon Short Line & Utah Northern Railway Company shall enter and file on the first day of the next session of the circuit court of the United States in and for the district of Oregon copies of all process, pleadings, depositions, and testimony and other proceedings in a certain suit or action now pending in the circuit court of the county of Wasco, State of Oregon, in which Jane Skottowe is plaintiff and the said Oregon Short Line & Utah Northern Railway Company is defendant, and shall do such other and appropriate acts that under and by the statutes of the United States are required in that behalf upon the removal of a suit from a State court into said United States court, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

20 Witness our hands and seals this 8th day of November, 1890.

THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO.,
By E. W. McNEIL. [SEAL.]
E. W. McN.
G.
EDWARD COOKINGHAM. [SEAL.]
B. CAMPBELL. [SEAL.]

21–32 In the circuit court, State of Oregon, county of Wasco. Jane Skottowe *vs.* O. S. L. & U. N. R'y Co. Bond on removal U. S. court. Filed Nov. 10, 1890. J. B. Crossen, clerk, by G. P. Morgan, deputy.

* * * * * * * *

33 *Demurrer.*

In the Circuit Court of the State of Oregon in and for the County of Wasco.

JANE SKOTTOWE, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Defendant.

The defendant demurs to plaintiff's complaint, and for cause of demurrer shows that the plaintiff does not state facts sufficient to constitute a cause of action.

W. W. COTTON,
ZERA SNOW AND
B. S. HUNTINGTON,
Attorneys for Defendant.

I hereby accept due and legal service of the within and foregoing demurrer upon me, at Dalles city, Oregon, this 16th day of February, 1891.

A. S. BENNETT,
Attorney for Plaintiff.

34 Circuit court, Wasco county, Oregon. Skottowe *vs.* O. S. L. & U. N. R'y Co. Demurrer. Filed Feb'y 14, 1891. J. B. Crossen, clerk. Cotton, Snow & Huntington, att'ys for defendant.

35 In the Circuit Court of the State of Oregon for the County of Wasco.

JANE SKOTTOWE, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Defendant. } Defendant's Answer.

Defendant, The Oregon Short Line & Utah Northern R'y Co., not waiving but expressly reserving its objection and protest, heretofore made, that this cause is removable to and has been removed to the circuit court of the United States for the district of Oregon, and that this court has no jurisdiction of this action or of further proceedings herein because of such removal, and answering herein only because the court has ordered all further proceedings in this action to be had herein, for answer to the plaintiff's complaint, denies that it is a corporation duly organized or existing for any purpose, except that defendant alleges it is and at the time of the accident complained of it was a corporation incorporated and created by the consolidation of the Oregon Short Line R'y Co., a corporation created by the act of Congress of August 2, 1882, entitled "An act creating the Oregon Short Line R'y Co., a corporation in the Territories of Utah, Idaho, and Wyoming;" the Utah & Northern R'y Co., a corporation created by an act of the Congress of the United States, approved June 20, 1878, making said company a railway corporation in the Territories of Utah, Idaho, and Montana, and other
36 several corporations created and organized under the laws of the Territories of Utah, Idaho, and Wyoming and the State of Nevada, which consolidation forming the defendant company was perfected August 1, 1889, pursuant to the laws of the United States, of the Territories, now States, of Wyoming and Idaho, and the State of Nevada and the Territory of Utah, and by the charter powers of defendant it was authorized to construct and operate railroads in the State of Oregon and to lease and operate railroads therein, and by virtue of such incorporation defendant has a defence herein arising under the Constitution and laws of the United States, and this action arises thereunder.

That by its charter powers and the terms of its organization and consolidation it was and is organized to construct and operate a line of railway from a point on the line of the Union Pacific R'y Co. in Wyoming and near to the town of Granger to the boundary line between Oregon and Idaho, at some point on Snake river and near to the town of Huntington, Oregon, and was operating and has so operated such a line of railroad; that by its charter it was empowered and authorized likewise to acquire and lease other railroads in Oregon and operate the same under lease.

Denies that at the time in the complaint mentioned or at any time it owned or was possessed of or operated the line of railroad in the complaint mentioned, except this defendant alleges that it was operating said line of railroad under and pursuant to a lease of the same from the Oregon Railway & Navigation Company, perfected as to this defendant prior to the accident referred to.

Denies that it was in possession of or operating the line of boats referred to or the bridges, wharf-boats, or ways used in getting to or from the landings of boats referred to, except defendant
37 alleges at and about the time of the accident referred to and for a little time prior thereto it was and had been operating a line of river-boats plying on the Columbia river under a lease thereof from the Oregon Railway & Navigation Company, which boats at the time of the accident referred to landed in the neighborhood of The Dalles, the city referred to; but this defendant denies that it was in possession of or operating or in control of the certain plankway described in the complaint as an elevated bridge at the point or place thereon from which it is alleged plaintiff fell and was injured and for some distance on either side thereof.

Denies that the boat landing in the complaint mentioned was a quarter of a mile below the business and residence portion of Dalles city or any distance nearer thereto than one-half mile.

Denies that the elevated bridge referred to, from which it is alleged plaintiff fell, at and for some distance either side of such place of fall was either owned, controlled, or operated by this defendant or that it was used by it as a means of passing to and from the wharf-boat and landing referred to, except as the same was used by this defendent in common with the public generally for the purpose of reaching the said landing; and this defendant alleges that the elevated bridge referred to was a certain plank road, which at the place and point where it is alleged plaintiff fell was an extension of and a part of one of the public streets of Dalles city, and as such and not otherwise and for more than ten years prior to the accident complained of had been used by the public generally as a public highway, and the same was such public highway for the purpose of ingress and egress to and from the Columbia river and landing thereon, at which divers and sundry lines of boats and barges during all of said time of such use had been accustomed to
38 land, and which said plankway or roadway was in existence and had been used for more than ten years prior to August 1, 1889, and was in existence as such at the time this defendant undertook the operation of a line of steamboats on said river; that said plankway or roadway was constructed by some person or persons other than this defendant, and at the place of the fall and injury complained of and long prior thereto and long prior to any operation of any boats by this defendant on said river had been dedicated to the public and by it accepted as such highway.

Denies that on the 17th day of October and long prior thereto or at or from or during any time this defendant had permitted the railing upon the north side or upon any side of the elevated bridge to get out of repair or to be torn down or negligently or carelessly or otherwise suffered said bridge to be or remain without any railing at said point, or that this defendant had permitted any railing upon the same at any point thereon whereby it was made dangerous or unsafe for persons travelling over the same going to and from the wharf-boat or landing in the complaint referred to.

Denies that at said times or at any time or for a great length of

time or for any time prior to the accident complained of the defendant had been or was in the habit of permitting persons travelling upon the boats referred to to go upon the same at night or sleep thereon, or to go upon the same at night or sleep thereon, so as to be there at the time of starting in the morning or for any other purpose, except, as this defendant alleges the fact to be, that at the personal request and for and on account of personal conveniences of persons desiring to travel upon said boats, but not as a common carrier or for any other purposes, or for any other purposes in connection with its business as common carriers, or for any purposes except for the convenience of and at the solicitation
39 of persons desiring to travel, this defendant had when so requested and only when so requested permitted a person when making application therefor at the landing of the said boat to go upon its boats at the point of landing thereof, it being, according to the course of business of defendant, optional with this defendant to permit or reject the application to go upon its boats for the purpose of sleeping thereon as this defendant might determine at the time of each application for the privilege so to do.

Denies that on the 17th day of October, 1890, or at any other time plaintiff started to go across said bridge to said wharf-boat and landing of the defendant, where the defendant's boat then was, for the purpose of taking passage thereon for the aforesaid city of Portland.

Denies that while the plaintiff was passing over said bridge or landing or otherwise, or as alleged in the complaint or otherwise, or after dark or otherwise, or on the evening of said day or at any time, by reason of the defendant negligently or otherwise permitting the said railing upon said bridge to be torn down or remain torn down or away, or by reason of any negligence of defendant in failing to provide lights thereon, or by reason of the defective or dangerous construction of said bridge, the plaintiff walked or fell from the same to the ground below, or that she so or otherwise walked or fell from the same to the ground below without fault upon her part, or that by reason of defendant's negligently permitting the said railing upon the said bridge to be down or remain torn down or away, or by reason of any negligence of the defendant in failing to provide lights thereon, or by reason of any defective or dangerous construction of said bridge, the plaintiff walked or fell from the same, whereby she suffered great or any bodily or
40 mental pain, or whereby she has been permanently injured or incapacitated from getting about or carrying on her usual avocations or of enjoying life, or whereby she will continue to suffer great physical or mental pain or discomfort through the remaining years of her life or for any period of time, or whereby she has been compelled to or did expend or incur large sums of money for medicine, medical skill or attendance, care or nursing, or whereby or by reason of any alleged fall, injury, or suffering she is or has been damaged, or that the same is all to her damage in the full sum of fifty thousand dollars or in any sum whatsoever; and this defendant denies that by reason of any act or omission in the complaint

charged or any fall, pain, or suffering in the complaint alleged the plaintiff has been damaged in the sum of fifty thousand dollars or any other sum whatsoever.

And this defendant alleges that on or about the evening of the 17th of October, 1890, and at an unreasonable time prior to the time of the departure from The Dalles of the next boat, about to be started out therefrom by the defendant, the plaintiff undertook to go to the landing on the Columbia river where the boats operated by the defendant landed for the purpose of soliciting leave to sleep thereon and for the purpose of sleeping thereon should leave be so obtained, and while attempting to go to said landing to solicit of defendant's employés leave to go upon and sleep upon said boat, and not to go as a passenger thereon, plaintiff voluntarily undertook to walk over a certain plank road or roadway, which is the bridge in the complaint referred to, and while going thereover for the purpose aforesaid turned and stepped thereover and was injured, the nature and extent of which injuries this defendant is not informed of; that at the place thereon where the plaintiff fell and for some distance on either side thereof said plank or road way was
41 a continuation of and a part of one of the public streets of Dalles city and was a public highway, and the same had been long prior thereto, dedicated as such to the public and by the public accepted, and the same had been for more than ten years prior thereto used by the public as and for one of the public streets of Dalles city and as such public highway.

For a further and separate answer and defense this defendant alleges—

That at the time of the alleged fall and injury in the complaint mentioned the plaintiff was an old person, to wit, over the age of eighty years; that she was feeble physically; that on or about the night of the 17th of October, 1890, and at an unreasonable time prior to the departure of the next boat next to leave Dalles city, while passing over a certain plank or road way, which is the bridge in the complaint referred to, and unattended by any person other than one other person, to wit, one Nicholas J. Skottowe, who was likewise old, to wit, over the age of eighty years, and physically feeble, the plaintiff negligently and carelessly walked thereover and so negligently and carelessly conducted herself while so walking thereover that she walked off and fell from said plankway, a long way distant from the landing place of defendant's boats, thereby contributing to any injuries by her received.

That the plaintiff had been at the wharf landing of the boats operated by defendant during the daytime and a few hours before her said fall and knew and could have known by the exercise of care on her part that the railing in the complaint referred to was out and had been out, and at the time of her stepping off of said plankway and the consequent fall and injuries by her received plaintiff knew and by the exercise of ordinary care and diligence on her part could have known that the place where she so stepped off and fell was not the place where defendant's boats landed; that at

and before the fall of the plaintiff, plaintiff neglected to
42 exercise the reasona-l- senses and faculties by her endowed with and carelessly and negligently failed to recollect and remember the place where defendant's boats landed and at which place passengers would be received, whereby and by reason of her own carelessness and negligence she caused and contributed to the fall and injury by her complained of; that the place where she so fell was reasonably well lit up, and plaintiff by the exercise of her sense of sight and ordinary care on her part could have seen and discovered that the railing by her alleged to be out was out and could have avoided the accident on her part.

Wherefore defendant, having fully answered, prays to be hence dismissed with its costs and disbursements herein.

W. W. COTTON,
GILBERT & SNOW,
B. S. HUNTINGTON,
Attorneys for Defendant.

STATE OF OREGON, } ss:
County of Wasco, }

I, Edward Cookingham, being duly sworn, depose and say: I am assistant to the general superintendent of the defendant company, which company has no president or other head of the corporation in this State. I have read the foregoing answer and believe the same to be true.

EDWARD COOKINGHAM.

Subscribed and sworn to before me this 25th day of February, 1891.

[SEAL.] WALLACE McCAMANT,
Notary Public for Oregon.

43 In the circuit court of the State of Oregon, county of Wasco. Jane Skotto-e, plaintiff, *vs.* Oregon Short Line & Utah Northern Railway Co., defendant. Defendant's answer. Due service of the within by certified copy, as prescribed by law, is hereby admitted *at* this 28th day of Feb., 1891. A. S. Bennett, attorney for plaintiff. Filed Feb. 28, 1891. J. B. Crossen, clerk. Law department Union Pacific system (Pacific division). W. W. Cotton, gen. att'y. Zera Snow, ass't gen. att'y.

44 *Reply.*

In the Circuit Court of the State of Oregon for Wasco County.

JANE SKOTTOWE, Plaintiff,
vs.
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Defendant.

Plaintiff, for reply to the new matter set up in defendant's answer—

Denies that the defendant corporation was created by the act

of Congress — August 2, 1882, referred to in defendant's answer, or by any act of Congress.

Denies that the elevated bridge referred to in plaintiff's complaint was a certain plankway, or that at the place or point where the plaintiff fell it was an extension or a part of one of the public or any streets of Dalles city, or that it had been used as such or not otherwise for more than 10 years or for any time prior to the accident complained of, or that it had for that or any time been used by the public generally as a public highway, except as a public highway provided by the defendant by means of which the public passed to and from its boats.

Denies that divers or sundry lines of boats or barges during all or any of said time had been accustomed to land at any place leading to defendant's plankway, or that any boats had been accustomed to so land except the boats of the defendant.

45 Denies that said elevated bridge had been at any time prior to the injury or at all dedicated to the public or by it accepted as a highway.

Denies that the defendant did not permit persons to sleep upon its boats as a common carrier, and denies that it did not permit them so to sleep for any purpose except for the convenience of or at the solicitation of the persons desiring to travel, but alleges that they took said persons upon said boat to sleep thereon as a matter of business and charged them an extra compensation over and above their passage therefor.

Denies any knowledge or information sufficient to form a belief as to whether or not it was, according to the course of the business of the defendant or at all, optional with defendant to permit or reject an applicant to go upon its boats for the purpose of sleeping thereon as the defendant might determine or at all.

For a reply to defendant's alleged first separate answer and defense the plaintiff denies and alleges as follows:

Denies that the plaintiff undertook to go to the landing where the defendant's boats landed at an unreasonable time prior to the departure of the same, or that she went there for the purpose of soliciting leave to sleep upon said boats, or that the injury occurred while she was attempting to go to said landing to solicit leave to sleep thereon, or that it did not occur while she was going to the same as a passenger thereon.

Denies that the plaintiff at the time of the injury turned and stepped over or from said bridge.

Denies that at the place where the plaintiff fell or for some
46 or *or* any distance on either side of said place said elevated bridge or alleged plank or road way was a continuation of or a part of one or any of the public streets of Dalles city, or that the same was a public highway, except that it was a public highway provided by the defendant for ingress and egress to and from its boats for the public travelling upon said line of boats; denies that the same had for a long or any time prior thereto been dedicated to the public or by the public accepted, or that the same had for more than ten years prior thereto or any time been used by the public

except as hereinbefore stated, or that it had ever been used by the public as one of the public streets of Dalles city as such or as any public highway, except as hereinbefore stated.

And, replying to the alleged second separate answer and defense of the defendant, denies that at the time of the injury she was feeble physically, or that plaintiff undertook to go over said bridge, or that the injury occurred at an unreasonable time prior to the departure of the defendant's next boat, or that Nicholas J. Skottowe, the person who was attending her, was physically feeble, or that plaintiff negligently or carelessly walked over said bridge or negligently or carelessly conducted herself while so walking thereover, or that by reason of any such carelessness or any negligence she walked or fell from said plankway, or that said fall occurred a long way distant from the landing place of defendant's boats, or that she thereby or at all contributed to any injuries by her received.

Denies that the plaintiff knew or could have known by the exercise of care on her part that the railing in the complaint referred to was out or had been out, or that at the time of her fall and injury she knew or could have known by the exercise of
47 ordinary care and diligence or any care or diligence on her part that the place where she stepped off and fell was not the place where the defendant's boats landed.

Denies that (on) or before the fall of the plaintiff or at any time or at all plaintiff neglected to exercise the reasonable senses or faculties by her endowed with or carelessly or negligently failed to recollect or remember the place where the defendant's boats landed or at which passengers would be received, or that thereby by reason of her own carelessness or negligence she caused or contributed to the fall or injury by her complained of.

Denies that the place where she fell was reasonably well or at all lit up, or that plaintiff by the exercise of her sense of sight or ordinary care on her part or any care could have seen or discovered that the railing by her alleged to be out was out or could have avoided the accident on her part.

A. S. BENNETT,
Attorney for Plaintiff.

STATE OF OREGON, }
County of Wasco, } *ss*:

I, A. S. Bennett, being first duly sworn, say upon my oath that I am attorney of the plaintiff in the above-entitled cause; that the above and foregoing reply is true, as I verily believe, and that I make this affidavit for the reason that the plaintiff is not now in the State of Oregon.

A. S. BENNETT.

Subscribed and sworn to before me this 25th day of May, 1891.
J. T. MULLON,
Notary Public for Oregon.

48–57 In the circuit court, State of Oregon, for the county of Wasco. Jane Skottowe, plaintiff, *v.* O. S. L. & U. N. R'y

Co., def't. Reply. Filed May 25, 1891. J. B. Crossen, clerk. A. S. Bennett, attorney for plaintiff.

* * * * * * *

58-60 At a regular term of the hon. the circuit court of the State of Oregon for the county of Wasco, begun and held at the court-house, in Dalles city, on the 25 day of May, 1891, at which were present the following officers:

Hon. W. L. Bradshaw, judge; D. L. Cates, sheriff; J. B. Crossen, clerk.

And the following proceedings *was* had on Saturday, the 20 day of June, A. D. 1891, the same being the 22nd judicial day of said term, to wit:

Judgment on Verdict.

JANE SKOTTOWE, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Defendant.

Now, on this day, comes the plaintiff in the above-entitled cause, by her attorney, A. S. Bennett, and moves the court for judgment upon the verdict entered herein, and it appearing to the court that she is entitled thereto—

Now, therefore, it is ordered, adjudged, and considered that the plaintiff, Jane Skottowe, have and recover from the defendant, The Oregon Short Line & Utah Northern Railway Company, the sum of ten thousand dollars and her costs and disbursements made and expended in this action, taxed at $—.

(Signed) W. L. BRADSHAW, *Judge.*

Attest: J. B. CROSSEN, *Clerk.*
By G. P. MORGAN, *Deputy.*

* * * * * * *

61 In the Circuit Court of the State of Oregon for the County of Wasco.

JANE SKOTTOWE, Plaintiff,
v.
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO., Defendant.

Notice of Appeal.

To the above-named plaintiff and to Mr. A. S. Bennett, plaintiff's attorney:

You will take notice that the defendant above named hereby appeals from the judgment entered in the above-entitled action in favor of the plaintiff and against the defendant for the sum of $10,000.00 and for costs and disbursements, said judgment having been rendered on the 20th day of June, 1891, and the defendant now makes and alleges the following assignment of errors upon which the defendant will reply upon this appeal:

First. The court erred in overruling the petition for a removal of this cause filed by the defendant, removing this cause to the circuit court of the United States for the district of Oregon, and in overruling and directing this cause to proceed in the circuit court of the State of Oregon for the county of Wasco over the objection and protest of the defendant and in entertaining jurisdiction of this cause and proceeding therein to judgment after such petition for removal.

Second. The court erred in permitting the deposition of Jane Skottowe to be read in evidence in this cause and in overruling the defendant's objection thereto made on the ground that the same was not properly certified.

62 Third. The court erred in permitting an answer to the following question in the deposition of Jane Skottowe:

Q. 9. State, if you know, whether your husband had secured tickets from The Dalles to Portland, Oregon; and, if so, how and in what way?

And in overruling the objection made by the defendant to the answer given thereto, which is set out in the bill of exceptions.

Fourth. The court erred in permitting an answer to the following question in the deposition read in evidence of Jane Skottowe:

Q. 18. State fully any other facts you may know in reference to this case.

Fifth. The court erred in permitting the answer of the witness Jane Skottowe to be read in evidence and given by said witness in answer to question 1 on redirect examination, which question is as follows:

Q. 1. Have you any knowledge as to whether the place where the accident occurred was really a street at all except the fact that it was open so it could be travelled?

Sixth. The court erred in permitting the witness Allen, called for the plaintiff, to testify over the objection of the defendant as to the repair of the bridge from which the accident happened after the happening of the accident and to testify as to under whose directions such repairs were made.

Seventh. The court erred in refusing to charge the jury to find for the defendant.

Eighth. The court erred in refusing to instruct the jury that if the plaintiff was passing over the bridge in question on the way to the boat landing for the purpose of sleeping on the boat that night, although intending to take passage thereon when it should

63 & 64 leave the following morning, and that in fact the boat which plaintiff was thus seeking did not leave on its passage to go to the place of plaintiff's destination until the following morning, and that while so passing over this bridge the plaintiff stepped or fell therefrom, the verdict should be for the defendant, even though the jury may believe from the evidence that the railing of the bridge was out, as charged.

Ninth. The court erred in refusing to give the following instruction:

Regarding the question of the ownership and control of the property upon which the bridge is constructed, I instruct you that

the possession and control of this in the defendant is disputed by the defendant. It is contended by the defendant that the place of the accident was upon property not under its ownership, possession, or control. It is also contended by the defendant that it was a public highway or roadway. If the same were at the time of the accident a public roadway or street and as such was used by the public as a public highway, even though it was principally used for the purpose of transacting business which the public might have with the defendant company and was but little used for other purposes, then I instruct you that under the evidence in the case there was no obligation on the part of the defendant to keep up this railing which it is asserted was out of repair, and this is so even though you may further find from the evidence that the bridge in question was constructed by any person or company who preceded the defendant company in the operation of the line of boats in the river.

Tenth. The court erred in refusing to give the following instruction:

65 If the jury believe from the evidence that the property over which the bridge or roadway in question was constructed at a point thereon at which it is claimed the accident happened was the property of Dalles city, and that the same at the place where the accident happened had been ordered by Dalles city to be platted as one of the streets of Dalles city and was so platted and in conveyances of property contiguous thereto it had been referred to and designated as one of the streets of Dalles city, then I instruct the jury that the place where the accident happened was a public highway, and the same must be so considered by the jury in arriving at a verdict in this case.

Eleventh. The court erred in refusing to give the following instruction:

In determining the question of what would be a dedication to and acceptance by the public for the purpose of a public highway I instruct the jury that it is not necessary even that Dalles city should have formally accepted the property as one of its public streets nor caused the same to be platted as such, nor is any formal dedication by deed or other formal paper necessary to constitute a dedication; but if the jury believe from the evidence that the owner of the property had intenti-ally permitted its use by the public as a public highway, intending to confer upon the public the right at all times and forever to use the same as such highway, and if the jury further believe from the evidence that the public generally, intending to accept it as such highway generally, used it as a public highway, although principally used to reach premises occupied by the defendant company and so used for the purpose of transacting business with that company, then I instruct the jury that

66 this would be a dedication to and acceptance by the public; and if Dalles city had recognized this bridgeway at a point thereon where the accident happened as one of its public streets by any deed executed by it or by any act or deed of its mayor and common council, indicating thereby that it was the intention

of Dalles city to recognize and establish the same as one of its public streets, then I instruct you that in arriving at a conclusion in this case it must be determined by the jury that the place where the accident happened was upon a public highway.

And in giving, in lieu of the foregoing instruction, the following:

In determining the question of what would be a dedication to and acceptance by the public for the purpose of a public highway I instruct the jury that it is not necessary even that Dalles city should formally accept the property as one of its public streets nor caused the same to be platted as such, nor is any formal dedication by deed or other formal paper necessary to constitute a dedication; but if the jury believe from the evidence that the owner of the property had intentionally permitted its use by the public as a public highway, intending to confer upon the public the right at all times and forever to use the same as such highway, and if the jury further believe from the evidence that the public, intending to accept it as such highway, used it as a public highway, although principally used to reach premises occupied by the defendant company and so used for the purpose of transacting business with that company, then I instruct the jury that this would be a dedication to and acceptance by the public.

Twelfth. The court erred in refusing to give the following instruction:

67 I further instruct the jury that even though the jury may believe from the evidence that the place where the accident happened was not a street or highway, yet if the jury believe from the evidence that it was the property of some other person than the defendant or the Oregon Railway and Navigation Company, and that this bridge or road way to the boat landing, although the jury may believe it was constructed by the Oregon Railway and Navigation Company, was used by the defendant company only in the same way and in the same manner that other people used it, namely, purely as a way to and from the boat landings of the defendant company's boats, and that the exclusive possession and control of the same was not asserted or contended for by the defendant company, but only such use and control as other people used it, then I instruct the jury that there was no obligation on the part of the defendant company to keep or preserve the bridge or railing in repair.

Thirteenth. The court erred in instructing the jury as to what would constitute a public highway and a dedication therefor to the public and an acceptance by it and as to the burden of proof to establish such a highway by its instructions given in the case and set out in the bill of exceptions on file herein and numbered 8, 10, and 11.

Fourteenth. The court erred in refusing to give the following instruction to the jury:

The defendant company, even though the jury may find it had control and possession of the road or roadway in question, and that it was the way to the boat landing of the defendant's boats, was not

under obligations to keep the same reasonably well lighted at all times of the night, and in determining this question of lighting the jury should take into consideration the question of when the boats of the company were to depart. The defendant company was under obligation only to see that the approaches to its boat landings where its boats were to depart from were kept reasonably well lighted only for a reasonable time prior to the departure of its boats.

68

Fifteenth. The court erred in refusing to give the following instruction:

There is no evidence in the case that the defendant or any of its officers or servants connected with its business knew at or just before the happening of the accident that the plaintiff was about to proceed or was proceeding along the bridge or road way for the purpose of going to defendant's boat to sleep thereon or to take passage thereon, nor is there any evidence in the case showing that the defendant or any of its officers or servants were informed by plaintiff or other person or knew or by reasonable inquiry or diligence could have known that plaintiff intended to go down over the bridge or road way at the time it is claimed she went for the purpose of seeking defendant's boat to take passage or sleep thereon.

Sixteenth. The court erred in refusing to give the following instruction to the jury:

It was not the duty of the defendant to keep lighted the road or bridge way in question leading to the landing place of defendant's boats at any and all times when persons should be desirous of passing thereover for the purpose of sleeping on or taking passage in defendant's boats, and if at the time of the accident the boat of the defendant which was to go out the next morning from The Dalles had not yet arrived at its landing, but before its arrival thereat plaintiff undertook to pass over the bridge in question for the purpose of going to the landing place of the boat, there to take a boat which was to go out the next morning or to sleep thereon, and in so passing over the bridge for this purpose the plaintiff stepped or fell therefrom at a place thereon where there was no panel, even though the jury may believe it was dark at the time, the bridge not reasonably well lighted, and that had it been so reasonably well lighted at the time the accident would not have happened nor the plaintiff — injured, then the verdict should be for the defendant.

69

Seventeenth. The court erred in refusing to give the following instruction to the jury:

If the jury believe from the evidence that on the afternoon of the evening previous to the accident plaintiff had been to the boat landing of the defendant company's boats, and in so doing had passed and repassed over the bridge or road way in question, and at that time the railing thereon was out, as now complained of, and if while at the boat landing plaintiff had received information that the boat which she desired to take would leave from this landing the following morning, and if the jury further believe from the evidence that thereafter and after dark of the same day she undertook to go to

this landing for the purpose of getting on board the boat to sleep thereon and in order to be there when the boat should start the following morning, and if the jury further believe from the evidence that while so on the way to the boat during the evening and while passing over the bridge in question plaintiff observed lights on the river near to and opposite the place on the bridge where there was a railing out, and that, mistaking the lights so seen as the landing place of the boat which she previously visited, she carelessly stepped off the bridge at a point where the railing was out, believing that she was going in the direction of the boat landing, and if the jury further believe from the evidence that the point where she so
70 stepped off from the bridge was a long distance from the regular landing place of the boat and from that point where she had been informed the boat would land, and that she should have known this fact, then I instruct the jury that the verdict must be for the defendant.

And in giving the following as a modification of and in lieu thereof:

If the jury believe from the evidence that on the afternoon of the evening previous to the accident plaintiff had been to the boat landing of the defendant company's boats, and in so doing had passed and repassed over the bridge or road way in question, and at that time the railing thereon was out, as now complained of, and if while at the boat landing plaintiff had received information that the boat which she desired to take would leave from this landing the following morning, and if the jury further believe from the evidence that thereafter and after dark of the same day she undertook to go to this landing for the purpose of getting on board the boat to sleep thereon and in order to be there when the boat should start the following morning, and if the jury should further believe from the evidence that while so on the way to the boat during the evening and while passing over the bridge in question plaintiff observed lights on the river near to and opposite the place on the bridge where there was a railing out, and that, mistaking the lights so seen as the landing place of the boat which she had previously visited, she carelessly stepped off the bridge at a point where the railing was out, believing that she was going in the direction of the boat landing, and if the jury further believe from the evidence that the point where she so stepped off the bridge was a long distance from the regular landing place of the boat and from the point where she had been informed the boat would land, and that she should have
71 known this fact, then I instruct the jury that they may consider that fact in considering the question of contributory negligence on the part of plaintiff.

Eighteenth. The court erred in giving the following instruction to the jury:

Gentlemen of the jury, the time has come in this case for the court to instruct you on what it considers to be the law governing this case, and the first question for you to consider is whether or not the defendant is liable upon this question. I charge you that it is the duty of a steamboat company to use reasonable care to see

that all ways and approaches, constructed by it and under its control, leading to its wharves and steamboat landings are kept in such order and repair as to make them reasonably safe for the passage of persons attempting to travel over the same for the purpose of taking passage upon its boats, and if they neglect such reasonable care and permit the same to become unsafe and out of repair and injury to such persons results therefrom, without fault or negligence on the part of such persons, then the company would be liable for such injury.

Nineteenth. The court erred in giving the following instruction to the jury:

If you find from the evidence that Mr. and Mrs. Skottowe were at the time of the injury going down to the defendant's boat for the purpose of taking passage thereon for Portland, with the intention of sleeping on the boat that night, so as to be upon the same at the time of starting in the morning, and if you further find that the defendant had been and was in the habit of and accustomed to take passengers on board in the evening and permitting them to sleep thereon and leave with the boat in the morning, then its liabilities as to a passenger passing over its walks and ways in the
72 evening for such purpose would be just the same, and its duties as to keeping its ways to its boats in repair would be just the same as it would towards a passenger going to the boat at the hour of starting in the morning.

Twentieth. The court erred in giving the following instruction to the jury:

The mere fact that the place where the injury occurred was at a place marked on the plats of the city as a public street would not relieve the company from liability if the bridge in question was constructed by it or its predecessors in interest as a way to its wharves and boat landings and if it was operated and controlled by them and by the defendant company as a part of such way up to and at the time of the accident.

Twenty-first. The court erred in giving the following instruction to the jury:

The city is not bound to open and grade all of the streets laid out upon the city plats, and if it leaves any street unopened and ungraded, and a private person like a steamboat or railroad company build an elevated way over any portion of such unopened street for their own use and continue to operate and control such elevated way for the purpose of enabling passengers to reach its boat and permits it to get in bad repair, then it would be responsible for such lack of repair, notwithstanding it was in what was platted as a public street.

Twenty-second. The court erred in giving the following instruction to the jury:

If you should find for the plaintiff, Jane Skottowe, you should (have?) in that event compensate her, not only for the actual pecuniary loss which she has suffered by reason of money paid out for medical expenses, etc., but you should also give her a fair
73 compensation for any other injury which she has sustained

by reason of the fall. If she has sustained permanent injury thereby and you believe from the evidence that she will always be an invalid or a cripple, then you should give her a fair compensation for such permanent disability, and you should also compensate her fairly for the pain and suffering which she has undergone by reason of the injury.

Twenty-third. The court erred in refusing to give the following instruction:

If the jury find that the plaintiff is entitled to recover (then I instruct you that the damage in the case which the plaintiff is entitled to recover?), then I instruct you that the damage in the case which the plaintiff would be entitled to recover is wholly a pecuniary one, which should be assessed at such an amount as will fairly compensate the plaintiff for the actual money damage plaintiff has sustained. You must be guided by the instructions I give you on that question. The damages in the case cannot be increased from any feeling or commiseration or sympathy for the plaintiff, but the only question is, What is the actual damage which has been sustained? It is not the province of the jury to assess any damages by way of punishment. This is not such a case as that what is called in the law punitive damages can be assessed; nothing but the actual damage which the evidence discloses has been sustained can be awarded.

And in giving the following as a modification and in lieu thereof:

If you should find that the plaintiff is entitled to recover, then I instruct you that the damage in the case which the plaintiff would be entitled to recover is wholly a pecuniary one, which should be assessed at such an amount as will fairly compensate the plaintiff for the actual money damage plaintiff has sustained.

74 You must be guided by the instructions I give you on that question. The damages in the case cannot be increased by any feeling of commiseration or sympathy for the plaintiff, but the only question is, What is the actual damage which has been sustained? It is not the province of the jury to assess any damage by way of punishment. This is not such a case as that what is called in law punitive damages can be assessed; nothing but the actual pecuniary damages which the evidence discloses has been sustained can be awarded; but by money damage in the above instruction I mean to include a fair compensation for any physical pain and suffering which Mrs. Skottowe may have sustained by reason of the injury.

Twenty-fourth. The court erred in refusing to give the following instruction: I instruct the jury also, as to the measure of damages, that in determining what sum should be awarded to the plaintiff, Jane Skottowe, as damages, if you find she is entitled to recover at all, it is not what sum the jury or any member of the jury would be willing to subject yourselves to the accident, nor yet for what sum you would be willing to subject any relative or friend to the accident; that is not a criterion to determine the measure of damages; but the question is, What damages in money has Mrs. Skot-

towe suffered? should you find she is entitled to recover, and that damage is measured solely from a money standpoint, under the instructions which I give or may give you on the question of what is the measure of damage and for what should compensation be awarded.

And in giving the following as a modification and in lieu thereof, I instruct the jury also, as to the measure of damages, that in determining what sum should be awarded to the plaintiff, Jane Skottowe, as damages, if you find she is entitled to recover at all,

75 *at all* it is not what sum the jury or any member of the jury would be willing to subject yourselves to the accident, nor yet for what sum you would be willing to subject any relative or friend to the accident; that is not a criterion to determine the measure of damages; but the question is, What damages in money has Mrs. Skottowe suffered, should you find she is entitled to recover, and that damage is measured entirely from a money standpoint, under the instructions I have given or may give you on that subject as to what is the measure of damage and for what should compensation be awarded; but her damage, if any, would include compensation for pain and suffering and permanent injury, if any.

Twenty-fifth. The court erred in refusing to give the following instruction to the jury:

In regard to the claim of permanent injury to Mrs. Skottowe and as to her case, I instruct you if she has sustained permanent injury you may award such damages therefor as from all the evidence in the case it is shown she has sustained thereby; but I instruct you that in determining the question of permanent injury you should carefully weigh all of the evidence in the case and should feel that by the evidence in the case and by no other criterion she has been permanently injured. It is not that she may possibly have been permanently injured, but the question is, Can the jury say from all the evidence in the case that she has been permanently injured? And unless the jury feel that by all the evidence in the case and not by speculation or probability she has been injured permanently, then the jury should say in conclusion that she has not been permanently injured, and in that event, should the jury find for Mrs. Skottowe, you will award her only such other damages as under the law and the evidence in the case you may find she has sustained.

And in giving the following as a modification and in lieu thereof:

In regard to the claim of permanent injury to Mrs. Skottowe and as to her case, I instruct you if she has sustained permanent

76 injury you may award such damages therefor as from all the evidence in the case it is shown she has sustained thereby.

But I instruct you that in determining the question of permanent injury you should carefully weigh all the evidence in the case and should feel that by the evidence in the case and by no other criterion she has been permanently injured. The question is, Can the jury say from all the evidence in the case she has been injured permanently? Then the jury should say in conclusion that she has not been permanently injured, and in that event, should the

jury find for Mrs. Skottowe, you will award her only such other damages as under the law and the evidence in the case you may find she has sustained.

Twenty-sixth. The court erred in overruling the defendant's demurrer to the plaintiff's complaint.

Twenty-seventh. The court erred in overruling the defendant's motion for a nonsuit.

Twenty-eighth. The court erred in denying the defendant's motion for a new trial and in entering judgment for the plaintiff.

W. W. COTTON,
GILBERT & SNOW,
Att'ys for Defendant.

77–81 No. —. In the circuit court of the State of Oregon, county of Wasco. Jane Skottowe, plaintiff, *vs.* Oregon Short Line & Utah Northern R'y Co., defendant. Notice of appeal. Due service of the within notice of appeal by certified copy, as prescribed by law, is hereby admitted at Dalles, Oregon, this 3rd day of October, 1891, in behalf of plaintiff. A. S. Bennett, — plaintiff. Filed Oct. 3rd, 1891. J. B. Crossen, clerk, by G. P. Morgan, deputy. Law dep't Union Pacific system (Pacific division).

* * * * * * *

82 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the 7th day, of March, 1892—present, Hon. Reuben S. Strahan, chief justice; Hon. William P. Lord, associate justice; Hon. Robert S. Bean, associate justice, and J. J. Murphy, clerk—the following proceedings were had on Saturday, the 18th day of June, 1892, the same being the 40th judicial day of said term:

Judgment.

JANE SKOTTOWE, Respondent, *v.* THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Appellant.	Appeal from Wasco County.

This cause having heretofore, to wit, on the 26th day of April, 1892, been argued and submitted by the attorneys of the respective parties above named and by the court then reserved for further consideration, and the court, having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon and being now fully advised in the premises, finds that there is not error as alleged.

It is therefore considered, ordered, and adjudged that the judgment in this cause in the court below rendered be, and the same hereby is, in all things affirmed, and that the respondent recover of appellant and D. F. Sherman, its surety on appeal, the sum of ten thousand ($10,000.00) dollars and interest thereon since June

20, 1891, at 8 per cent. per annum, together with her costs and disbursements in this court upon said appeal, allowed and taxed at $—, and her costs and disbursements in said cause in the court below, taxed and to be there taxed. It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance herewith.

83 I further certify that the opinion of the court filed in said cause and upon which the judgment of affirmance was entered was as follows:

Opinion of Supreme Court.

84 Filed June 18, 1892.

JANE SKOTTOWE, Pl'ff & Resp.,
v.
O. S. L. & U. N. R'y Co., Def't & App.

and

J. T. MULLEN, as Adm'r of the Estate of Nicholas J. Skottowe, Dec'd, Pl'ff & Resp.,
v.
O. S. L. & U. N. R'y Co., Def't & App.

W. W. Cotton, Zera Snow, and Wallace McCamant, for def't.
Alfred S. Bennett, for pl'ff.

85 LORD, *J.*:

These actions are brought by Jane Skottowe, in the one case, and by J. T. Mullen, as administrator of the estate of Nicholas J. Skottowe, in the other case, against the defendant to recover damages resulting from a fall by Jane Skottowe and her deceased husband from an elevated way leading from The Dalles city to the defendant's boat landing, which fall caused serious injury to Jane Skottowe and the death of her husband. The liability of the defendant is predicated on the ground that the defendant was negligent in failing to keep in repair the elevated way or bridge from which the plaintiff and the deceased fell and were injured and in failing to provide such place with proper lights.

The answer of the defendant put in issue all the material allegations of the complaint, and further alleging that the elevated way or bridge causing the injury and death was not the property or in the possession or under the control of the defendant, and, as a separate defense, that the plaintiff and her deceased husband were guilty of contributory negligence.

The facts are substantially these: The plaintiff and her deceased husband were citizens of Ireland, travelling in this country with the double purpose of visiting a son who resided in the State of Wyoming and such places as would interest them or contribute to their pleasure. It would seem that they had secured a round-trip ticket from Portland to The Dalles and return, and that they had come

up to The Dalles by railroad with the intention of returning to Portland by the river on one of the boats of the defendant for the purpose of obtaining a more complete view of the Columbia river scenery. The boats of the defendant were fitted up with state-rooms and other adjuncts for the comfort and accommodation of its
86 passengers. As the hour at which the defendant's boats were accustomed to leave in the morning was early, seven o'clock, the company, for its own advantage and for the convenience of its passengers, allowed them to come on board of its boats at night and to sleep there. For this accommodation the defendant charged and received a specified consideration and by reason of it its passengers were saved from the necessity of arising at an inconvenient hour in the morning in order to reach the boat. The plaintiff and her husband reached The Dalles some time about the middle of the day and during the afternoon went down to the wharf-boat, as it would seem, for the purpose of acquainting themselves with the way to the boat's landing and ascertaining what arrangements were necessary to be made to get on board of the boat. The agent of the defendant informed them at the office that they could come on board of the boat that night, as soon as it come in, and sleep there until morning, so that they would be on the boat at its hour of starting. Concluding to avail themselves of this accommodation, they returned uptown, and after getting a meal at a restaurant and walking and looking around until the time had come for the boat to arrive, they started down to its landing. It was after dark when the defendant's boat came in, but, owing to the fact that it had a barge in tow, it proceeded up the river, under slow bells, past its landing place to a point on the river about opposite the place where the accident occurred for the purpose of landing the barge, when it turned back to make its landing. Her lights were lit, and it was while some of these things were occurring that the accident happened. The landing place of the defendant's boat is some distance below the inhabited portion of The Dalles and is reached by a long elevated incline and narrow roadway which passes over Mill creek by means
87 of a bridge. One portion of this roadway, at the point where it leaves the inhabited portion of The Dalles, is occupied by the defendant's railroad tracks and leads to its shops, while the other portion of it gradually inclines and leads to its wharf or boat landing. These two ways at the point where the injury occurred are connected and rest on the same timbers. These situation is difficult to describe, but it is shown on the photographic exhibits. The different ways were originally built by the O. S. N. Co., the defendant's predecessor in interest, for the purposes specified, and since then have been constantly used as a means of access to and from its shops and the landing place of its boats.

At different times the company has rebuilt and repaired this roadway, raised and changed it, and exercised various acts of control over it. The place where the accident occurred and over which the elevated roadway or bridge crosses Mill creek is a short distance below the last building in the inhabited portion of the city. The land under the bridge was doubtless a public street at the point of

the accident, as it seems to have been platted as such; but the city has never opened it as a street nor exercised any control or ownership over the elevated roadway or bridge. "There was no evidence," the record says, "in the case tending to show that Dalles city or any one except the railroad company and its predecessors in interest had exercised any control of the bridge at the place where the accident occurred or had ever operated or repaired the same." The bridge is from 12 to 20 feet from the ground, which is of a rocky and uneven character, and along the bridge there has always been a "rail running," which a short while before the accident got loose and came off and never was replaced until after the injury occurred.

88 The circumstances of the fall from this bridge are thus related by the plaintiff: "We had passed the town and got to the way leading to the boat, it being then nearly dark. We suddenly fell down a height. The fall rendered me unconscious. I was aroused by my husband's calls for help. I became unconscious again, and then got conscious again when the men came to carry me up from where I had fallen. Shortly before the accident we remarked to each other on the want of light. We were feeling our way cautiously along immediately before the accident. My husband's calls for help at the place of the accident was the first thing I knew after the accident, while we were lying on the stones near the river."

The injury to the husband of the plaintiff was of such a character as to cause his death a day or two afterwards. The injury to the plaintiff confined her to her bed for many months and, the evidence indicates, will render her subject, perhaps, to much suffering and a cripple for the remainder of her life. From these facts and circumstances it seems evident that the plaintiff and her deceased husband while passing over the bridge or elevated roadway, seeing the boat out in the river, which was lighted up, and supposing that they had reached the landing, walked through the opening occasioned by the want of railing and were precipitated upon the rocks below.

Upon this state of facts the most vital point of the contention for the defendant is that the duty of a passenger-carrier to provide reasonably safe approaches to a landing place or station is confined only to the immediate vicinity of its landing or station and to approaches on its own ground or right of way, and that as the facts show that the land over which the bridge was constructed and

89 where the accident occurred was a public street the defendant was under no obligation to keep such bridge in repair or properly lighted. There are other questions connected with this upon which error is alleged and to which we shall advert at the proper time. There is, however, a preliminary question upon the evidence, to which an exception was taken, that must be first disposed of. One Mr. Allen was called as a witness for the plaintiff, and testifies that he was in the employ of the defendant and engaged in carpenter-work; that about two days after the accident he repaired the bridge by replacing the missing railing. He was then

asked the question, "Under whose direction?" To this question the defendant objected as incompetent and immaterial, whereupon plaintiff's counsel stated in open court and in the presence of the jury that he did not offer the testimony for the purpose of showing negligence, but for the purpose of showing acts of ownership and control over the bridge, and the court ruled that the evidence should be received for that purpose, and that purpose only. The witness then answered that he was instructed by Mr. De Huff, the company's foreman or superintendent at the shops. It is conceded that this evidence is hardly sufficient to show that Mr. De Huff had authority from the railroad company to make the repair in question, but no proper means were taken to get rid of this aspect of it. As already disclosed, this evidence was offered for the purpose of showing that the bridge or place where the injury was received was under the control of the defendant. As applicable to this object, no objection is made if the evidence shall be restricted exclusively to this purpose. It is not the fact that repairs were actually made by the defendant, or the inference of control or ownership sought to be drawn to which objection is urged, but that such evidence is inadmissible for that purpose unless the jury was instructed or ex-
90 pressly cautioned by the court when it was received that it could not be considered by them on the question of negligence; hence it was argued, notwithstanding counsel for the plaintiff stated that the evidence upon objection was only offered to prove the control of the defendant of the place of injury and not to prove negligence, and the court ruled in the presence of the jury that it would only be admitted for the purpose of showing control, that this statement and ruling was not enough to remove the objection for incompetency, unless the court went further when the evidence was received and instructed or cautioned the jury that they could not take it into consideration upon the question of negligence on the part of the defendant; otherwise the jury would be authorized to consider such evidence as proof of negligence or to treat it as a link in the chain of such proof, contrary to the well-established rule that subsequent repairs are not competent for the purpose of proving antecedent negligence. That this rule is now to be regarded as settled law in a proper case is not controverted, as the authorities in support of it fully indicate (Morse *v.* Minneapolis, etc., Co., 30 Minn., 465; Terre Haute, etc., R. Co. *v.* Clem, 123 Ind., 15; Nally *v.* Hartford, 51 Conn., 524; Hudson *v.* Chicago & N. R. Co., 59 Iowa, 581); but the principle seems equally as well established that while evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury was received was under the control of the defendant, who may require the court, if he chooses, to restrict it to that point by a proper instruction. As the court said in City of La Fayette *v.* Wravel *et al.*, 92 Ind., 479, that such evidence "was not admissible to prove negligence on the part of the city, the question as to which was to

be determined by what was known before, and at the
91 time of the accident, but it was evidence of the city's recognition of the defect in the sidewalk as one which the city was bound to repair, and was admissible for such purpose. * * * By proper request the appellant could, through an instruction, cause the restriction of the evidence to its legitimate effect." (See Elliott on Streets, 650, and authorities cited in notes.) Independent of these considerations, we do not think there was any liability of the jury considering the evidence for any other purpose than showing control or authority over the *locus in quo*, as the circumstances under which it was admitted expressly restricted it to this purpose and exclude the idea of its being admitted to prove negligence; so that as the exception stands, while we agree that such evidence is and ought to be regarded under any circumstances as incompetent as an admission of negligence, we do not understand it is incompetent to show authority over the *locus in quo* or control over the place where the injury occurred.

If the evidence was competent for this purpose, there was no other defect, except possibly to show the authority of De Huff to order the repairs—his agency to connect the company with the making of the repairs; but this was regarded as of no consequence, and merited little attention of counsel, for the reason, doubtless, that there was other evidence before the accident indicative of the defendant's control over the place of injury or recognition of its duty to keep the bridge in good condition and repair, such as the construction and repair of the bridge and the exclusive use of it as a means of access to its boat landing. Moreover, as the question was asked, the answer might have been that the repair of the bridge was directed to be done by the representative of the defendant, so far as the court could know; but if the answer did not sufficiently connect the company, turned out to be
92 improper, it was the duty of the defendant, claiming to be injured by it, to move to strike it out. Still, if we thought the evidence was incompetent as the case stands, in view of its importance and liability to arise frequently in the trial court, we should hesitate to excuse the error solely because no motion was made to strike it out. The next alleged error is the refusal of the trial court to direct a verdict for the defendant. The contention is that the undisputed evidence shows no liability upon the part of the defendant. This is based upon the assumption that the undisputed evidence shows that the elevated walk or bridge to the boat landing of the defendant is upon a public street, and as a consequence neither the defendant nor its predecessors had any right to occupy the street by a bridge for this purpose, and that even if they did so originally by constructing and subsequently by keeping it in repair, it was a voluntary act and placed the defendant under no obligation to keep it in repair or liability for want of repair. As the question involved is important and vital, as affecting the liability of the defendant, it deserves to receive, despite the pressure of our duties, our best consideration. At the risk, therefore, of some repetition of the facts already stated, but to make more clear, if

possible, the relation of the defendant to the *locus in quo* as a part of its means of approach to its boat landing and the relation of the city to it, as showing its control over it, we quote from the bill of exceptions the following facts: "Plaintiff also called as witnesses John Cates, R. A. Roscoe, and George H. Knaggs, whose evidence tended to show that the bridge in question, from which it is claimed that the fall occurred, was constructed by the Oregon Steam Navigation Co., a transportation company engaged in operating boats and portage roads from The Dalles, on the Columbia river;
93 that the Oregon Railway & Navigation Company succeeded to the Oregon Steam Navigation Company, and further tended to show that the Oregon Railway and Navigation Company continued to operate and control the bridge until their railroad and boat line was leased to the defendant, as shown herein, and that the bridge in question was the bridge extending on from Main street, in Dalles city, across a ravine through which Mill creek runs and leading to the lower boat landing used by the Oregon Railway & Navigation Company as a landing for the boats operated by them on the Columbia river; that it was such bridge leading to such landing at the time of the lease and since then it had been used by the present company in operating boats on said river as a means of access to and from the town of The Dalles and the boat landing.

The evidence further tended to show that the bridge had been raised once or twice by the Oregon Railway and Navigation Company and the defendant company, and that the defendant company had exercised acts of control over the bridge in keeping the same up and preventing it from being floated away by high water, and by means of the route over this bridge—it was the only route to the lower boat landing—and no other person or persons had had anything to do with the control of said bridge or keeping it in repair from the time it was built up to the time of the injury to the plaintiff.

The evidence of these witnesses also tended to show that there was no business other than that connected with the defendant company's business west of the bridge in question which would take persons thereover, and that the bridge was used only by persons having business with the defendant company, and that it was used by such persons in travelling to and from its wharf for the
94 *the* purpose of travelling over its line and in shipping and receiving freight.

The testimony of these witnesses further tended to show that one side of the bridge in question was a railroad bridge, used exclusively by the defendant as a means of access to its shops and round-houses, the other portion of the same being a narrow plank roadway, used as a means of access to and from its boat line and wharves, with the two ways separated and deflected from each other some distance west of the place where plaintiff was injured.

In view of these facts, it is important to ascertain the duties of the defendant as a public carrier to keep all the approaches to their boat landing or depot, owned by them or constructed by them and under their control or in their possession and used in connection

therewith, safe and convenient for the use of its patrons or those who have lawful occasion to use them.

Dillon, C. J., laid down the rule, as founded upon reason and authority, that "railroads are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort; all portions of their station ground reasonably near to the platforms, where passengers or those who have purchased tickets with a view to passage on their cars would naturally or ordinarily go" (McDonald *v.* Chicago, etc., R. R. Co., 26 Iowa, 145). Such corporations are not only bound to keep their platforms and landing places safe and convenient for all who make use of their cars or boats as a means of conveyance, but they are bound to make the approaches over their own premises or premises in their possession and used in connection therewith safe and convenient for passengers. The liability for the non-performance of this duty by such corporation is founded on the
95 general principle that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass for a lawful purpose, by an invition, express or implied, can recover damages for the injury sustained against the individual so inviting and being in default for the defect (Barrett *v.* Black, 56 Me., 498; Carleton *v.* Franconia Iron Co., 99 Mass., 219). This principle finds its illustration in Tobin *v.* S. & P. R. R. Co., 59 Me., 183. There a hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform and was injured, and it was held that the company was liable, and that the liability was the same notwithstanding the platform was within the limits of the highway. The court, after stating that it was the duty of such corporations to make the approaches to their depots safe and convenient and likewise to so keep their platforms and landing places, not only for those who are passengers, but for all who have rightful occasion to use them, says:

"It is objected that the defendant built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have trespassed upon the rights of the public. They have built the platform and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation and they are responsible for its condition. It may be that the city of Portland might be liable for a nuisance within the limits of their public highways erected and maintained by the defendant corporation; but, if so, the city has the right of reclamation against
96 those creating the nuisance. Much more, then, could the party injured maintain his action directly against the corporation causing the injury."

In Quimby *v.* B. & M. R. R. Co., 69 Me., 340, these principles are reasserted, but the fact that the sidewalk where the injury occurred was not in the possession and control of the defendant as one of the approaches to their station defeated a recovery. The court says: "A railroad corporation is bound to keep its depot and the grounds

around it owned by the corporation or in its possession and used in connection with it safe and convenient for persons who have lawful occasion to use them. It is bound to keep all approaches to its depot constructed by it and under its control, for the use of persons having lawful occasion to use them, to go to or from its depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway. The burden was on the plaintiff to show that the walk where he received his injury was constructed by the defendants and was in their possession and control as one of the approaches to their station." The court then proceeds to state the facts, showing that the sidewalk was not in the possession of the defendant, but that the city had resumed control over it and kept it in repair, and as a consequence that the defendant corporation was not liable.

The court says: "Upon this state of facts we think it clear that the defendants were under no obligation to keep the sidewalk in repair. It was no part of their bridge. It was a part of the public street, under control of the city. The defendants had no right to enter upon it to make any changes or repair. Their liability ceased when they restored the condition of the sidewalk to the acceptance of the city." This case is cited by the defendant, but the
97 principle it declares and recognizes is fatal to its contention.

Mr. Hutchinson says: "It is the duty of the carrier to provide a reasonably safe means of getting to and from the station, and it will be liable for an injury resulting from its failure to do so, and if passengers habitually, naturally, and with the acquiescence of the carrier adopt a certain route, especially a route pointed out by the customs and methods of the carrier, it is the duty of the latter to take reasonable precautions to so guard and maintain it that passengers will not thereby suffer injury. It is immaterial in this respect whether the carrier furnished the route or provided or constructed the means of passage or not. If with the full knowledge of the facts it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as though it had itself set up and maintained the dangerous way. The same rules apply to carriers by water, who are liable for furnishing dangerous gang-planks for use by passengers." (Hutchinson on Carriers (2 ed.), sec. 519; Cross *v.* Railway Co., 69 Mich., 363; Hoffman *v.* R. R. Co., 75 N. Y., 605; Green *v.* Penn. R'y Co., 36 Fed. Rep., 68; Texas R. R. Co. *v.* Orr, 46 Ark., 195; Wallace *v.* R. R. Co., 18 Atl. R., 818; Collins *v.* R. R. Co., 80 Mich., 390.)

Plainly, then, it is the duty of such corporations to provide reasonable accommodations at their stations and landing places, to keep in safe condition all portions of their platform and approaches thereto, and furnish safe and proper means of ingress and egress therefrom, even though some part of it may be constructed upon a highway, if the same be in their possession or under their control and used in connection with them.

98 This duty and the liability of such corporations for its non-performance, when an injury occurrs in respect to such places, platforms, approaches, as well as to furnish lights, is also

fully stated, and the cases maintaining it, collected in 30 Am. & Eng. R. Cas., 555*n*; but by this it is not meant that such companies are bound to keep their premises absolutely safe, or that they are liable for accidents due to want of ordinary care on the part of the injured person. They are only bound to exercise ordinary care in view of the dangers to be apprehended. The distinction between such liability for an injury to a passenger occurring on their cars or boats and for an injury occurring on their platforms or approaches to the station or landing places is well recognized. (Penn. Co. *v.* Marion, 104 Ind., 239; Moreland *v.* Boston, etc., R'y Co., 141 Mass., 31; Kelly *v.* Man. R'y Co., 112 N. Y., 443.)

Nor is there any claim that the defendant is an insurer, but that it was bound to use ordinary care to keep its approaches to its boat landing safe and convenient, and that to leave a railing off of a bridge of this kind at such a place and at such a height from the ground for a period of several weeks was a want of ordinary care, if not gross negligence. Nor do the cases cited by defendant conflict with these principles, as declared by the authorities, or support its contention. It will be sufficient to notice those claimed to be most in point. In Eisenburg *v.* Mo. Pac. R'y Co., 33 Mo. App., 91, it did not appear that the road had been built by the defendant and held out to its patrons as a way to its depot. There was another and safer road, and the exact situation of the defect was known to the plaintiff. The only element in the case is that prior to the
99 accident the company had improved it, but upon the plaintiff's own testimony the case was void of all elements of negligence upon the part of the defendant. The court says: "In the case at bar the danger was neither a hidden nor recent danger. The excavation existed before the road was built. The plaintiff knew the exact situation for years. His drivers knew it. This very driver had travelled over the road repeatedly on the day of the accident. He discussed such dangers, when they were in full view and in broad daylight, with his fellow-servant, and, knowing what risk he undertook, voluntarily assumed it, although he might have used another and safer road." It was a clear case of contributory negligence.

In Cusic *v.* Adams, 115 N. Y., 58, the bridge was built for the convenience of the defendant. The plaintiff was a stranger to him and to whom he owed no duty, nor was the plaintiff upon the bridge upon the defendant's invitation nor to do any business with him, but for the purpose of seeing a shooting match upon an island with which the defendant had no connection whatever.

In Texas, etc., R'y Co. *v.* De Sommers, 15 S. W. Rep., 806, the testimony was so positive and definite that the defendant had nothing whatever to do with the crossing at the place of the injury that the verdict was held contrary to the evidence. There is no relevancy in these cases or the others cited to the case at bar, nor is there anything in the fact, if it be admitted, that the land where this bridge was constructed and maintained by the defendant was platted as one of the public streets. It by no means follows that the city was bound to open the same to public travel. As Thayer, C. J.,

after showing that the dedication of streets by maps and plats was irrevocable and vested them in the public, said: "But it does not follow that the city is under any obligation to open and improve such streets at once. They may be allowed to remain dor-
100 mant until their use becomes a public necessity." (Meier *v.* Portland Cable Co., 16 Or., 500.)

There is no pretense or evidence to show that the city had opened this street beyond its inhabited portion. The evidence is undisputed that the defendant built the bridge partly upon it for its own purposes and has ever since used it exclusively as a railroad bridge and as a way to its boats. The city had nothing to do with it. "There was no business other than that connected with the defendant company's business west of the bridge in question which would take a person thereover, and it was used only by persons having business with the defendant company in travelling to and from its wharf for the purpose of travelling over its line and in shipping and receiving freight." So runs the record; nor do we think there is anything in the contention that the defendant is not liable because the plaintiff and her husband started to go on the boat in the evening instead of in the morning. It was the custom of the defendant to receive passengers on its boats in the evening and allow them to sleep there, for which they charged extra, or "fifty cents for single berths and six bits for double." Its officer at the wharf-boat informed the plaintiff and her husband of the custom, and they were going to the boat to avail themselves of it when the injury occurred. By so doing the defendant invited its patrons to take passage on its boats in the evening instead of in the morning, and was bound to make its approaches safe for the travel of such persons as it was for persons who come on board of the boat in the morning. We think there was no error. It is next objected that the court erred in declining to instruct the jury that the platting of the ground under the bridge in question as a public street and selling lots by reference to the same constituted a dedication of the street. This ob-
101 jection is embraced in five long instructions out of the numerous instructions asked and are justly subject to the criticism suggested by counsel. The proposition itself was not disputed as a matter of law, nor was the refusal of the court to give the instructions asked in conflict with it. It was the fact that the instructions ignored the distinction between the dedication of a street and the opening of that street as a public highway, by which the defendant sought to excuse liability, that caused the court to refuse them; but the view we have taken renders their further consideration unnecessary.

The evidence shows that the street was not opened by the city nor used by it, but that it was exclusively occupied by the defendant with its bridge as a means of access to its boat landing and under its control at the time of the accident. It is next objected that the trial court erred in refusing and modifying instruction number sixteen, upon the question of contributory negligence. This instruction is objectionable, but instruction thirty-nine, as given by the court, better states the law as applicable to the facts.

There can be no doubt but the bridge was a place where a railing or guard on it was necessary at all times, but especially after dark, when passengers were expected to travel over it to and from the landing place. The plaintiff and her husband were strangers, and the circumstances already stated were not such as the court could declare contributory negligence.

The next objection is that "the court erred in instructing the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of night, regardless of the time set for the departure of its boats." This refers to the court declining to give certain instructions asked by the defendant and giving cer-
102 tain others asked by the plaintiff.

By the instructions thus given and refused it is claimed that the court imposed upon the defendant the duty to keep the approaches or bridge constructed by it and under its control leading to its steamboat landing in such order and repair and so well lighted as to be reasonably safe at all hours of night. The complaint is that this laid the duty on the defendant, regardless of time and of the fact that the boat did not leave until the next morning. Upon this point the instruction given by the court was: "If the defendant had been in the habit of and accustomed to take passengers on the boat in the evening and permitting them to sleep thereon, then its liabilities as to a passenger passing over its walks and ways in the evening for such purpose would be just the same and its duties as to keeping its ways to its boat would be just the same as it would toward a passenger going to the boat at the hour of starting in the morning." The court did not therefore instruct the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of the night. The plaintiff and her husband were going down to the boat, as the evidence indicates, between six and eight o'clock in the evening.

It was the usual time when the defendant was in the habit of receiving passengers. They were invited to come on board and they had a right to be there. They were going there to do business with the defendant, to sleep on board of the boat all night, and to pay them for the accommodation. The benefit was mutual. It was not a gratuitous privilege for their own special convenience.

The boat was just coming into its landing and the time was in the evening and appropriate.

103 There is no claim, nor can be, on the facts that it was the duty of the defendant to keep its approaches to its landing safe at all hours of the night, but that it was its duty in the evening, when it was accustomed to receive passengers. Whether it was the duty of the defendant to keep them in that condition at other later hours in the night was a matter with which the plaintiff in this case has no concern.

It is next objected that the damages awarded are excessive. The damages assessed by the jury are large. The evidence tends to indicate that the plaintiff is permanently injured. "I think," says the medical witness, "that if she does regain the use of her limb and it becomes free from pain, it will be several years. It will take

a long time to fully recover, if she ever does." She is unable now to stand without support, and altogether unable to walk, and still suffers great physical pain from the injury. The probabilities are that she will be a cripple during her life and subject to much pain and suffering. In such case different individuals would vary in their estimate of the sum which would be a just pecuniary compensation.

"It is one thing," said Mr. Justice Story, "for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury because it exceeds that measure." (Thurston *v.* Martin, 1 Mason, 197.) Nor is the fact to be overlooked that the judge who heard the testimony in refusing the motion for a new trial approved the verdict of the jury. In such case it has not been the practice of this court to interfere, nor, if such was the practice, are the damages given so excessive as to justify our interference. Many larger verdicts for less injuries have been sustained by the courts.

104 Thus far the cases have been considered together, but the point is made in the administrator case that no earning power was proven on the part of the deceased. This is based on the inference that the deceased was a wealthy man, living on his income. Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property are all to be considered. The deprivation of his affection and society cannot be taken into account. This would include skill in the management of wealth or capacity to manage affairs, which would be of advantage to an estate and the loss of which would prove a detriment to it. In view of all the circumstances, we are unable to say there was error and must affirm the judgments or judgment in both cases.

105 I further certify that thereafter and on the 27th day of June, 1892, there was filed with me a certain petition for writ of error; which said petition together with the order of allowance thereof, together with the undertaking in behalf of the plaintiff in error in said petition and the order of approval thereon endorsed, are as follows:

Petition for Writ of Error from Sup. Court U. S.

In the Supreme Court of the State of Oregon.

JANE SKOTTOWE, Plaintiff,
v.
OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Defendant.

To the Hon. R. S. Strahan, chief justice of the supreme court of the State of Oregon:

The petition of your petitioner, The Oregon Short Line & Utah Northern R'y Co., respectfully represents that heretofore, to wit,

prior to the 20th day of June, 1891, an action was begun in the circuit court of the State of Oregon for the county of Wasco, in which plaintiff above named was plaintiff and your petitioner was defendant; that in said action and on or about the 20th day of June, 1891, a judgment was recovered against your petitioner and in favor of the said plaintiff in said action for the sum of ten thousand dollars; that afterwards and within the time allowed by the statutes of the State of Oregon therefor your petitioner duly took its appeal to the supreme court of the State of Oregon, and thereafter and on
106 the 18th day of June, 1892, and at the March term of the said court, the said judgment of the circuit court of the State was by the judgment and order of the supreme court of the State affirmed.

That the supreme court of the State of Oregon, rendering a final judgment of affirmance on appeal therein, is the highest court of the State of Oregon in which a decision in said action could be had.

And your petitioner further shows that while yet the said suit was pending in the circuit court of the State of Oregon for the county of Wasco and on or about the 10th day of November, 1890, and before your petitioner's time for answering in said suit had expired, your petitioner duly filed in said court in which said action was begun its petition for the removal of the said cause to the circuit court of the United States for the district of Oregon; that in and by said petition your petitioner alleged that the said action was one of a civil nature, and that the matter and amount in dispute exceeded, exclusive of interest and costs, the sum of two thousand ($2,000.00) dollars; that your orator was a corporation organized and existing and possessing certain corporate powers embraced in, depending upon, and provided for in two certain acts of the Congress of the United States, in said petition for removal particularly set forth and mentioned, creating and organizing the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and the Utah and Northern Railway Company, a corporation in the Territories of Utah, Idaho, and Montana; that the two said several acts of Congress above referred to, creating the said several corporations above referred to, were a certain act of Congress of the United States approved August 2, 1892, and entitled "An act creating the Oregon Short Line Railway Company, a corporation in
107 the Territories of Utah, Idaho, and Wyoming, and for other purposes," and the act creating the Utah & Northern Railway Company, a corpor-tion in the Territories of Utah, Idaho, and Montana, approved June 20, 1878, and that your petitioner was a certain consolidated corporation created by certain articles of consolidation entered into by the said two last-named corporations and certain other railway corporations created and organized under and pursuant *of* the laws of the Territories of Utah and Wyoming and of the State of Nevada, and the said consolidation, your petitioner alleged in, and by its said petition, was perfected under and pursuant *of* the laws of the Territories of Utah and Wyoming and of the State of Nevada and of the laws of the

United States in force on the first day of August, 1889, and it was likewise set forth and averred in and by your petitioner's said petition that your said petitioner possessed and claimed to possess all of the corporate functions and powers held or possessed by the several constituent companies entering into said consolidation, including the said Oregon Short Line Railway Company and the said Utah & Northern Railway Company, among which said corporate powers was the claim of corporate existence, power, and authority as a Federal corporation under and by virtue of the several acts of Congress hereinbefore mentioned, and that your petitioner's corporate functions and powers were dependent upon, governed by, and wholly determined by the said several acts of Congress above mentioned, and that your petitioner in and by the consolidation above mentioned claimed a corporate existence under and pursuant to and by virtue of the action of — Congress of the United States aforesaid. Your petitioner further shows that in and by its said petition for removal it was alleged that the said action — was so begun and in which judgment was pro-
108 nounced as aforesaid was an action arising under the Constitution and laws of the United States, and more particularly the acts of Congress hereinbefore referred to, upon which the existence of your petitioner and its corporate powers and functions depended, and that your petitioner had a defense to said action arising under the laws of the United States, and particularly the laws hereinbefore referred to. It was further set forth in and by your petitioner's said petition for removal that the time for appeal or answer in said action in which the same was filed had not, at the time of the presentation of the said petition and of the filing of the same, expired, and your said petitioner in and by the said petition prayed the hon. the circuit court of the State of Oregon for the county of Wasco to proceed no further in said action except to make an order for removal from said court to the circuit court of the United States for the district of Oregon, and for that purpose to approve the bond then offered and exhibited by your petitioner in the event that the same should be found satisfactory to said court, and otherwise to permit your petitioner to present a good and sufficient bond and to cause the record to be removed to said circuit court of the United States; and your petitioner further shows that the bond hereinbefore referred to as being presented at the time of the presentation of the petition for removal above mentioned was duly presented to said court and was filed by your petitioner, and the same was a good and sufficient bond in the penal sum of five hundred ($500.00) dollars, to the effect that your petitioner would and should enter and file on the first day of the next session of the circuit court of the United States for the district of Oregon copies of all process, pleadings, depositions, or testimony, or other proceedings in said action, and which said bond was likewise conditioned to the
109 effect that your petitioner would and should do such other and appropriate acts as under and by virtue of the statutes of the United States are required in that behalf upon the removal of a suit or action from a State court unto the said United States

circuit court, and said bond was likewise conditioned that your petitioner should well and truly pay all costs that might be awarded by said circuit court of the United States if said court should hold or determine that said action was wrongfully or improperly removed thereto.

Your petitioner further shows that in and by a certain order made on the 14th day of November, 1890, by the hon. the circuit court of the State of Oregon for the county of Wasco, which was then being presided over by the Hon. E. D. Shattuck as presiding judge thereof, the said bond was in all respects approved, but yet so it is that on the day last aforesaid said circuit court of the State of Oregon, the Hon. E. D. Shattuck, presiding judge thereof, overruled and denied the petition of your petitioner and refused then or there to order the said cause removed, and then and there ordered that the said cause should remain and be retained in the circuit court of the State, and that all proceedings that might be had in said action should be had therein and in the circuit court of the State, the said presiding judge thereof being then of the opinion, and then so determining and deciding, that no sufficient cause for removal was stated in and by your petitioner's said petition for removal; and your petitioner shows thereupon that it duly excepted to the order and determination of the said court disallowing your petitioner's said petition, which said exception was then and there by the court allowed, and your petitioner then and there entered and noted its protest and objection to any further proceedings being had in said circuit court of the State in
110 said cause on the ground that the said cause was removable to and had been removed to the circuit court of the United States for the district of Oregon under and by virtue of your petitioner's said petition and bond therewith presented, which objection and protest were then and there by the court overruled, and again it was by the said court ordered that all proceedings which might be had in said cause should be had in such circuit court of the State, and the protest and objection of your petitioner *was* by said court entered, and it was ordered and permitted to your petitioner that all such further proceedings as might be had in the circuit court of the State would and should be had over the objection and protest of your petitioner, and thereupon your petitioner, to the end that it might not be defaulted in such further proceedings as might be had in such circuit court, remained defending the said action in said court, and so remained and defended therein only because of the order of said circuit court of the State refusing to remove the said cause and ordering and directing that the said cause be retained for all further proceedings in the said circuit court of the State.

Your petitioner further shows that thereafter such proceedings were had in said action in said circuit court of the State that the judgment hereinbefore referred to as having been entered therein was finally entered, and thereupon your petitioner duly took its appeal, as hereinbefore stated, to the hon. the supreme court of the State of Oregon, and, among other things, it was assigned as one of the errors to be relied upon by your petitioner upon said appeal,

and which error was by your petitioner duly presented by its
111 counsel and argued to the supreme court of the State; that the said supreme court in which said judgment was entered erred in denying your petitioner's petition for removal of said cause to the circuit court of the United States for the district of Oregon, and in ordering and directing that the said cause and all proceedings had therein be had in the circuit court of the State of Oregon for the county of Wasco, and it was made and asserted in and by your petitioner's notice of appeal and assignments of error on said appeal that the said circuit court of the State rendering the said judgment against your petitioner was without jurisdiction thereto, in that by your petitioner's said petition and bond for removal the said cause was removable to and had been removed to the circuit court of the United States for the district of Oregon and the same was no longer within the province of the said circuit court of the State for any proceedings or judgment therein.

Your petitioner further shows that the appeal of your petitioner to the hon. supreme court of the State in said cause came on duly to be heard at the March term of the said supreme court in the year 1892, and thereupon, upon the day hereinbefore stated and one of the days of the said March term, the said judgment of the circuit court of the State was in all respects affirmed, and your petitioner was by the judgment and order of the said supreme court finally denied its right of removal of the said cause to the said circuit court of the United States aforesaid, which said right your petitioner now avers was and is a right possessed by your petitioner under and by virtue of the laws of the United States, and that the final determination thereof by said supreme court, as your petitioner is advised and believes, was and is to defendant's great damage and in-
112 jury, and thereupon and by the record in such cause your petitioner shows to the court that a Federal question is involved in the said cause and was and has been determined and a right by your petitioner claimed under and by the laws of the United States was and has been determined adversely to your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Oregon, and such other process as will enable your orator to obtain a review of the said cause to the Supreme Court of the United States.

And your petitioner will ever pray, etc.

W. W. COTTON,
ZERA SNOW,
Attorneys for the Oregon Short Line & Utah Northern Railway Company.

STATE OF OREGON, }
County of Multnomah, } ss:

I, Zera Snow, being first duly sworn, depose and say that I am one of the attorneys for The Oregon Short Line & Utah Northern R'y Co., the petitioner named in the foregoing petition, and am now its acting general counsel and attorney in the State of Oregon, and

as such am authorized by the petitioner to make and present the foregoing petition in behalf of the petitioner, which said authority has been conferred upon me under and by virtue of the organization of the said petitioner and the various departments by it organized for the transaction of its business, legal and otherwise. I
113 have prepared the foregoing petition, and the statements of fact therein contained are true of my own knowledge and the same is true in all respects, as I verily believe.

ZERA SNOW.

Subscribed and sworn to before me this 25th day of June, 1892.

[SEAL.] WALLACE McCAMANT,
Notary Public for Oregon.

The foregoing petition being presented to me, the undersigned, chief justice of the supreme court of Oregon, after due consideration thereof the same is allowed and, the writ being issued, the same will be approved.

R. S. STRAHAN,
Chief Justice Supreme Court.

114 (Endorsed on back as follows:) In the supreme court of State of Oregon. Jane Skottowe *v.* Oregon Short Line & Utah Northern Railway Company. Petition for writ of error from Supreme Court U. S. Lodged and filed with me June 27, 1892. J. J. Murphy, clerk of the supreme court of the State of Oregon.

115 *Bond on Writ of Error.*

In the Supreme Court of the State of Oregon.

THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
JANE SKOTTOWE, Defendant in Error.

Know all men by these presents that I, D. P. Thompson, of Portland, Multnomah county, Oregon, am held and firmly bound unto Jane Skottowe in the sum of twenty thousand dollars, to be paid to the said Jane Skottowe, her executors or administrators; to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated this 27th day of June, 1892.

Whereas the above-named Oregon Short Line and Utah Northern Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named Oregon Short Line & Utah Northern Railway Company shall prosecute its said writ of error to effect and answer all costs and damages, including the just damages for delay, if it shall

fail to make good its pleas, then this obligation shall be void; otherwise to remain in full force and virtue.

D. P. THOMPSON. [SEAL.]

116 STATE OF OREGON, } ss:
County of Multnomah, }

I, D. P. Thompson, being duly sworn, say that I am worth the sum of forty thousand dollars in the State of Oregon over and above all my just debts and property exempt from execution.

D. P. THOMPSON.

Subscribed and sworn to before me this 27th day of June, 1892.

[SEAL.] WALLACE McCAMANT,
Notary Public for Oregon.

This bond approved this 27th day of June, A. D. 1892.

R. S. STRAHAN,
Chief Justice of the Supreme Court of Oregon.

117 In supreme court of State of Oregon. Oregon Short Line & Utah Northern R'y Co. *v.* Jane Skottowe. Bond on writ of error. Lodged with me and filed this 27th day of June, 1892. J. J. Murphy, clerk of the supreme court of the State of Oregon.

118 I further certify that on the 27th day of June, 1892, there was lodged with me a writ of error in said cause, which said writ is hereto and to this transcript attached, and that thereafter and on the 27th day of July, 1892, there was filed with me a citation, issued in said cause, together with the certificate of service thereof, and the same is hereto attached and now herewith returned with this transcript.

In witness whereof I have hereunto set my hand and affixed the seal of this court, at Salem, Oregon, this 5th day of August, 1892.

[Seal Supreme Court, State of Oregon.]

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

119 In the Supreme Court of the United States of America.

THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
JANE SKOTTOWE, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Oregon, before you or some of you, being the highest court

of law or equity of the said State in which the decision could be had in the said suit between Jane Skottowe and The Oregon Short Line & Utah Northern Railway Company, wherein a right was claimed under a statute of the United States and the decision was against the right specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said Oregon Short Line & Utah Northern Railway Company, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in *its* behalf, *we* command you, if judgment be
119½ therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being *expected*, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

The above writ allowed this 27th day of June, A. D. 1892.
R. S. STRAHAN,
Chief Justice of the Supreme Court of Oregon.

120 [Endorsed:] In Supreme Court of United States. O. S. L. & U. N. —, pl'ff, *v.* Jane Skottowe. Box 138. Writ of error. Lodged with me & filed this 27th day of June, 1892. J. J. Murphy, clerk of the supreme court of the State of Oregon.

120½ In the Supreme Court of the United States.

THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
JANE SKOTTOWE, Defendant in Error.

UNITED STATES OF AMERICA, *ss.*:

To Jane Skottowe, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed

in the clerk's office of the supreme court of the State of Oregon, wherein The Oregon Short Line & Utah Northern Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. S. Strahan, chief justice of the supreme court of the State of Oregon, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

R. S. STRAHAN,
Chief Justice of the Supreme Court of Oregon.

Due service of the above citation is hereby acknowledged
121 this — day of ——, A. D. 1892.

——— ———,
Attorney of Record for Defendant in Error.

DISTRICT OF OREGON, *ss:*

UNITED STATES MARSHAL'S OFFICE.

I, L. T. Barin, United States marshal for Oregon, hereby certify that on this sixth day of July, 1892, at Portland, Multnomah county, Oregon, I served the foregoing citation upon the defendant in error, Jane Skottowe, by delivering to and leaving with A. S. Bennett, the attorney of record for the said defendant, a true and correct copy of the foregoing citation, such service being so made at the time and place in this return above stated.

Fees of service, $4.12.

L. T. BARIN,
United States Marshal,
By O. P. MILLER, *Deputy.*

122 [Endorsed:] In Supreme Court of the United States. O. S. L. & U. N. —, pl'ff, *v.* Jane Skottowe, def't. Citation. Filed July 27, 1892. J. J. Murphy, clerk supreme court of Oregon.

123 In the Supreme Court of the United States.

OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
JANE SKOTTOWE, Defendant in Error.

A stipulation having heretofore been entered into to dispense with the forwarding of the bill of exceptions in this case, the same containing nothing material to the Federal question involved herein, now, for the purpose of further facilitating the hearing herein—

It is hereby stipulated between the attorneys for the respective parties hereto that the following parts of the record only shall be printed by the plaintiff in error, but with leave to either party hereto to refer to and use such other parts of the record as if the same had been fully printed, to wit: There shall be printed:

First. The complaint in the action.

Second. Petition for removal, bond on removal, and order denying removal of the cause.

Third. The demurrer and answer to the complaint and the reply to such answer.

Fourth. Notice of appeal to the supreme court of the State of Oregon; the judgment of the supreme court of said State.

Fifth. The opinion of the supreme court of the State.

Sixth. Petition for writ of error from the Supreme Court of the United States to the supreme court of the State and the order of allowance thereof and endorsements thereon; the writ of error issued herein from the Supreme Court of the United States to the supreme court of the State and allowance thereon and endorsements
124 thereon, together with the citation issued herein and the endorsements of service thereon and the supersedeas bond filed herein upon the writ of error sued out.

This stipulation to be without prejudice to the right in the defendant in error to contest the questions of whether or not a writ of error lies herein, whether the same has been properly sued out, and whether or not properly served, and all other questions save the simple one of the printing of the remainder of the record.

JOHN F. DILLON,
For Plaintiff in Error.
ALFRED S. BENNETT,
For Defendant in Error.

125 [Endorsed:] Case No. 15,108. Supreme Court U. S., October term, 1893. Term No., 792. The Oregon Short Line & Utah Northern R'y Co., P. E., *vs.* Jane Skottowe. Stipulation to print parts of record.

[Stamped:] Office Supreme Court U. S. Filed Aug. 18, 1893. James H. McKenney, clerk.

[Endorsed:] No. —. In the supreme court of the State of Oregon, March term, 1892. Jane Skottowe, res., *vs.* The O. S. L. & U. N. R'y Co., app. Filed —— —, 189–. —— ——, clerk.

Endorsed on cover: Case No. 15,108. Oregon supreme court. Term No., 147. The Oregon Short Line & Utah Northern Railway Company, plaintiff in error, *vs.* Jane Skottowe. Filed August 22d, 1892.